

1 Honorable Robert S. Lasnik
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 UNITED STATES OF AMERICA,

11 Plaintiff,

No. CR16-100RSL

12 v.
13 BINGHAM FOX,

MOTION TO EXCLUDE

14 Defendants.

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17 Noted for: March 28, 2017
18 Oral Argument Requested

19 Bingham [hereafter “Bing”] Fox, by his counsel, Barry Flegenheimer, moves *in*
20 *limine* to prohibit the government from introducing evidence or inquiring of witnesses as
21 to the following topic: evidence of cleanup due to the release of hazardous substances at
Blaine Marina that were caused by fuel storage and operations.

22 This motion is based on FRE 403 and 404(a) and (b) and Mr. Fox’s right to a fair
trial.

23 **I. BACKGROUND**

24 In the late afternoon of March 26, 2017, the government emailed defense counsel
the following notice:

25 MOTION TO EXCLUDE
[No. CR16-100RSL]
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In preparation for the cross-examination of the individuals on the defense witness list, we learned today that a portion of the property used by Drayton Harbor Fisheries, the Dodds, and Blaine Marina were subject to a Cleanup Action plan and Washington State remediation efforts that began as early as 1990. Part of the cleanup was necessitated due to the "release of hazardous substances from Blaine Marina operations" that was caused by fuel storage and operations that your client likely participated in. The United States may cross-examine your client and witnesses based on this information insofar as it goes to your client's and witness knowledge of marine fueling operations being a highly regulated activity and his knowledge of fuel releases into the environment.

When counsel requested documentation supporting the allegation, he was referred to a couple of web sites: <https://fortress.wa.gov/ecy/gsp/Sitepage.aspx?csid=63> and <HTTPS://www.portofbellingham.com/AgendaCenter/ViewFile/Minutes/07212016-109>.

In these websites there is no information in any way linking Bingham Fox to the wrongful release of hazardous substances or the fuel storage operations. Counsel understands and is prepared, if necessary, to put on testimony, outside the presence of the jury, establishing these facts.

By way of offer of proof, we believe the historical facts to be as follows. There had been a fueling operation at Blaine Marina. It closed in 2014. There are two docks for the crabbing operations at Blaine Marina, one had previously been the site of the fueling business. In 1995, Mr. Fox rented the other dock that had nothing whatsoever to do with the fueling business. Due to another crab business' needs, approximately two years ago the Port of Bellingham required Mr. Fox to relocate his crab business to the former defunct fuel operation dock. The fueling tank area of the dock is blocked off, barricaded from access by fencing and a locked gate. Never before, or since moving the crab business, has Mr. Fox, or anyone from his crab business had anything do with the old fuel operations.

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**II. PURSUANT TO FRE 403 AND 404 (a) AND (b), THE GOVERNMENT
 2 SHOULD BE PRECLUDED FROM INQUIRING OR PRESENTING
 3 EVIDENCE RELATED TO UNFOUNDED ALLEGATIONS OF MR.
 4 FOX'S INVOLVEMENT WITH FUELING OPERATIONS OR CLEANUP
 AT THE BLAINE MARINA.**

5 The general principles regarding the admission of non-charged acts of misconduct
 6 was fully out in Bingham's Fox's Motions *In Limine*. Dkt. 112, at 5-6. The Court is
 7 familiar with the evidence rules and the law in this regard. Thus, it will not be restated
 8 here. To protect Mr. Fox's right to a fair trial, the Court must prohibit the government
 9 from interjecting this wholly irrelevant and unsubstantiated character evidence.

10 First, there is no evidence Mr. Fox in any way, participated in any "wrongful act"
 11 related to the fuel operation business. There are no facts supporting the allegation.
 12 Without facts, the government's introduction of such evidence is entirely unfair and
 13 would deprive Mr. Fox of a fair trial.

14 Second, pursuant to FRE 404(a), "evidence of a person's character or character
 15 trait is not admissible to prove that on a particular occasion the person acted in
 16 accordance with the character or trait." Even if, despite the paucity of evidence thus far
 17 disclosed, the government believed Mr. Fox had some connection to the fueling
 18 operation, the fueling operation facts are not probative of any issue in this case. They
 19 simply do not prove any material point in this trial.

20 Third, the probative value of such evidence is vastly outweighed by the likely
 21 unfair prejudicial impact. FRE 403.

1 Fourth, if the Court believes the introduction of this unsubstantiated allegation to
2 be a permissible, the defense would need time to fully investigate the claim prior to
3 evidence being admitted.

4 In sum, the Court should exclude the government's reference to the fuel operation
5 evidence. Mr. Fox is entitled to a fair determination of guilt or innocence based on
6 evidence relevant to the particular offenses being tried, not negative character innuendo
7 the government is now attempting to interject.

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10 DATED: March 27, 2017.
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12 Respectfully submitted,

14 s/ Barry Flegenheimer
15 Attorney for Bingham Fox
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2 **CERTIFICATE OF SERVICE**
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I certify that on the date below, I filed the foregoing document with the Clerk of
the Court using the CM/ECF system which will send notification of filing to all parties
registered with the CM/ECF system.

DATED: 27 March 2017.

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